

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT GOODMAN	:	DETERMINATION
	:	DTA NO. 820171
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Period Ended June 30, 2000	:	
through December 31, 2002.	:	

Petitioner, Robert Goodman, 1523 45th Street, Brooklyn, New York 11219, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the period ended June 30, 2000 through December 31, 2002.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 18, 2005 at 10:30 A.M., with all briefs to be submitted by December 2, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Erez Tucner, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax on behalf of CAT-ECG Medical Services, P.C., who willfully failed to do so, thus becoming personally liable for a penalty equal to the unpaid tax pursuant to Tax Law § 685(g).

FINDINGS OF FACT

In its brief submitted on September 12, 2005, the Division of Taxation (“Division”) submitted 23 proposed findings of fact each of which has been substantially incorporated into the following Findings of Fact except for that portion of proposed finding of fact 10 which states that petitioner had authority to hire, supervise, evaluate and terminate employees and that he exercised that authority during the period at issue which is not supported by the record and that portion of proposed finding of fact 14 which states that “[p]etitioner was not simply a passive investor in the P.C.,” which is conclusory in nature.

In his reply brief submitted on December 2, 2005, petitioner submitted 21 proposed findings of fact each of which has been substantially incorporated into the following findings of fact except for proposed findings of fact 7 and 20 which are not supported by the record.

1. CAT-ECG Medical Services, P.C. (“the PC”) was a corporation engaged in providing medical diagnostic, cardiologic and neurologic testing services to skilled nursing facilities and medical offices.

2. On March 23, 1998, the PC’s predecessor, Lynbrook Cardiac Testing, P.C., entered into a Management and Services Agreement (“the MSA”) with CAT-ECG, LLC (“the LLC”) whereby the LLC would provide Lynbrook Cardiac Testing, P.C., with certain medical equipment, the right to use certain office premises and personal property including office equipment, and certain administrative services and nonmedical personnel. The MSA was signed, on behalf of the LLC, by Shaya Ostrov, Manager.

Pursuant to the MSA, the manager (the LLC) was to have the general responsibility for management of the nonprofessional aspects of the PC and would furnish to the PC all necessary and appropriate clerical and nonmedical personnel required to operate the PC’s office and

practice. The MSA provided that, upon request and reasonable notice, the LLC would make available for inspection and copying by the PC or its designee, any books, records and financial data maintained by the LLC which related to the practice and the compensation due to the LLC.

3. As part of the MSA between Lynbrook Cardiac Testing, P.C., and the LLC, the LLC granted to Lynbrook Cardiac Testing, P.C., the limited use of the name "CAT-ECG." On March 31, 1998, Lynbrook Cardiac Testing, P.C., filed an amendment with the New York State Department of State changing its name to CAT-ECG Medical Services, P.C. (the PC).

4. On July 30, 1999, the PC was purchased by Robert Goodman ("petitioner"). At the time of the purchase, petitioner became president and owner of 100 percent of the stock of the PC.

5. Petitioner is a physician licensed to practice medicine in the State of New York. During the period at issue, petitioner owned and operated a medical practice in the Borough Park section of Brooklyn, New York, where he practiced internal medicine and nephrology. Petitioner was present (except for hospital rounds to visit patients) at his private medical practice five days per week from approximately 8:15 A.M. until the last patient was seen in the afternoon, except for Fridays when, for religious reasons, his office would close around noon.

6. Prior to his purchase of the PC, petitioner was approached by Shaya Ostrov and Brian Sandhaus, two individuals with whom petitioner was acquainted, who told him that they were involved in a business by the name of CAT-ECG which had a cardiologist, Dr. Warren J. Wexelman, who was the owner and medical director of the PC. These individuals wanted petitioner to assume the responsibilities of Dr. Wexelman with whom Messrs. Ostrov and Sandhaus were having difficulty. The PC needed a physician authorized to practice medicine in New York State in order to be able to bill health insurance companies for patient charges.

Messrs. Ostrov and Sandhaus informed petitioner that he did not have to put any money down and that they would pay \$40,000.00 to purchase the PC from Dr. Wexelman. In addition, Messrs. Ostrov and Sandhaus advised petitioner that they would run the business on a day-to-day basis and that petitioner was needed just to supervise some of the medical aspects of the business. Petitioner, a medical doctor by profession, had no experience or background in corporate finance, accounting or running a business other than his own private medical practice. Petitioner was told that he would be paid the sum of \$25,000.00 per year to supervise the medical portion of the business; however, he never received the payments as promised. He was also told that the PC's business would be combined with other similar businesses which would eventually make him a lot more money.

7. The MSA executed March 23, 1998 between Lynbrook Cardiac Testing, P.C. and the LLC was assumed by the PC and was continued when the PC was purchased by petitioner in July 1999.

8. On August 2, 2000, Comprehensive Medical Diagnostic, Inc. ("CMDI") purchased the assets of the PC from the LLC. Petitioner remained as president and 100 percent shareholder of the PC. Petitioner received 250,000 shares of CMDI preferred stock which was worthless because it could not be traded. CMDI later purchased, in early 2001, a company known as Diagnostic Health Systems which was based in Lakewood, New Jersey. David Schick ran the business of CMDI although he was never listed on the corporate documents; James Clingham held the title of president of CMDI. Mr. Schick told Norman Goldhecht, the owner of Diagnostic Health Systems prior to its purchase by CMDI, that he was going to purchase various companies in the diagnostic testing business to expand the business. Mr. Schick also stated that he wanted to integrate Diagnostic Health Systems with the PC.

Mr. Schick later obtained a line of credit of \$1 million dollars on the business of Diagnostic Health Systems; however, the money never went into the business, and its bills were not being paid. David Schick ran into some difficulties in 2003 and CMDI ceased doing business.

9. At all times during the periods at issue, petitioner was the president and 100 percent shareholder and owner of the PC.

10. Petitioner was a signatory on the bank accounts of the PC with North Fork Bank and Fleet Bank, and he had the authority to sign checks on behalf of the PC.

11. Petitioner had authority to sign corporate tax returns and forms on behalf of the PC and did sign a withholding tax return for the period October 1 through December 31, 2002 and certain sales tax returns for various sales tax quarters during the period at issue; however, all of these returns were signed by petitioner on or after January 2003.

12. Petitioner had the authority to hire, supervise, evaluate and terminate all physicians on behalf of the PC.

13. Petitioner had the authority to and did, in fact, negotiate with the Internal Revenue Service ("IRS") and the New York State Department of Taxation and Finance with regard to the tax liabilities of the PC after being notified of such liabilities by the taxing authorities.

14. Petitioner made trips to the office of the PC approximately twice per year during the period at issue. Other than these trips to the PC's office, petitioner devoted substantially all of his time to his medical practice in Brooklyn.

15. The day-to-day operations of the PC were managed by David Schick, Mark Gray and Brian Sandhouse. The checks of the PC, including payroll checks and checks drawn to pay the

PC's expenses were signed by, among others, Stewart (Shaya) Ostrov, Mark Gray and Brian Sandhouse. Petitioner did not sign checks on behalf of the PC.

16. During the period at issue, until he was made aware of the tax liabilities of the PC at the end of 2002 or early in 2003, petitioner did not direct expenditures or determine the financial policies of the PC.

17. Other than procuring physicians to perform some duties for the PC, petitioner did not manage the employees, did not authorize payrolls and did not hire or fire the PC's employees. He did not participate in the day-to-day management of the PC except for supervising some of the medical aspects of the business and, on occasion, speaking with the cardiologist of the PC.

18. During the period at issue, petitioner did not sign tax returns for the PC. Tax returns were signed by petitioner after the period at issue when he became aware that the PC's taxes were not being paid.

19. When the PC opened an account at the North Fork Bank in August 2000, Mark Gray signed the authorization form as vice president, Brian Sandhouse signed as secretary and petitioner signed as president.

20. The LLC opened an account at the North Fork Bank in May 1999; the signatories on the account were Brian Sandhaus and Stewart Ostrov.

21. Petitioner had the authority to review the books and records, bank statements, tax returns and mail of the PC. He was not prevented or precluded from examining the PC's books and records or entering the PC's business location.

Petitioner stated that he always assumed things were being paid. "I assumed the business was run properly." When asked, on cross examination, whether the individuals at the LLC

periodically reported to him on the status of the PC, petitioner replied, “ Again, no, I didn’t know about the business aspects. I didn’t care. I thought it was being taken care of.”

22. In July 2002, petitioner hired Alex Galy, a business associate of petitioner’s who had experience with medical corporations, to oversee the financial affairs of the PC and to verify the veracity of its accounting. Even though Mark Gray was still handling the day-to-day operations of the PC, Mr. Galy was hired to determine whether Mark Gray was doing what he was supposed to be doing. Mr. Galy was employed by petitioner and was paid out of petitioner’s personal funds. Petitioner is unsure as to what books and records were reviewed by Alex Galy; however, Mr. Galy subsequently informed petitioner that the PC was no longer viable.

23. Until he was made aware of the tax liabilities of the PC at the end of 2002 or early in 2003 when he was contacted by an IRS agent, petitioner never made a request to inspect the books, records and financial data of the PC nor did he instruct anyone else to do so on his behalf.

24. The IRS agent, Mrs. Roberts, contacted petitioner concerning the Federal tax liabilities. She stated that she contacted petitioner because she was getting nowhere with Mark Gray. Petitioner then confronted Mr. Gray who stated that he was not in charge but told petitioner that David Schick said that he would take care of it and that the taxes would be paid.

25. Petitioner borrowed \$50,000.00 to pay the PC’s Federal tax liabilities. This \$50,000.00 is now the subject of a refund claim.

Petitioner introduced into evidence a series of IRS documents which indicate that civil penalties assessed against petitioner were reduced. While petitioner’s representative stated that the penalties were assessed pursuant to Internal Revenue Code § 6672 for failure to collect and pay over tax as a person under a duty to do so and that such penalties were abated because the IRS subsequently determined that petitioner was not actively involved in the PC and was,

therefore, not under a duty to collect and pay over taxes on behalf of the PC, the documents produced indicate only that civil penalties (it is unclear as to the reasons for which the penalties were originally imposed) were reduced but do not state the reasons therefor.

26. The PC continued to pay expenses, other than withholding taxes, after petitioner discovered that the PC had failed to pay its withholding tax liabilities.

27. In order to prevent unauthorized users from having access to the PC's account, petitioner closed the PC's account with the North Fork Bank in May 2003 and opened a new account for the PC at Fleet Bank with petitioner named as the sole signatory for the account. The Fleet Bank account was opened with money remaining in the North Fork Bank account and with funds which were paid to the PC after May 2003.

28. Upon learning of the Federal tax liabilities, petitioner retained the services of the law firm of Meltzer, Lippe & Goldstein, LLP, on January 24, 2003. Sometime after learning of the PC's Federal tax liabilities, the Division contacted petitioner to inform him of New York State tax liabilities as well.

29. The Division reviewed the records of the PC for the periods at issue and upon making a determination that petitioner was a responsible person or officer of the PC, it issued the following notices of deficiency, on June 17, 2004, to petitioner:

Period Ended	Penalty	Balance Due
06-30-00	\$7,822.64	\$7,822.64
09-30-00	\$5,977.42	\$5,977.42
12-31-00	\$6,383.74	\$6,383.74
03-31-01	\$5,517.34	\$3,313.22 ¹

¹ A payment or credit in the amount of \$2,204.12 was made for this period; accordingly, the balance is \$3,313.22 for the period ended March 31, 2001.

06-30-01	\$6,775.19	\$6,775.19
09-30-01	\$5,921.01	\$5,921.01
12-31-01	\$8,330.03	\$8,330.03
03-31-02	\$6,897.21	\$6,897.21
06-30-02	\$4,100.42	\$4,100.42
09-30-02	\$5,830.53	\$5,830.53
12-31-02	\$3,381.11	\$3,381.11

30. In February 2003, on the advice of counsel, petitioner filed sales tax returns for the PC for the period June 1, 1999 through May 31, 2000, March 1, 2001 through May 31, 2002 and September 1, 2002 through November 30, 2002. With each return, petitioner issued checks in the amount of \$50.00 in payment of penalty. The \$50.00 checks were drawn on petitioner's personal account.

CONCLUSIONS OF LAW

A. With regard to the withholding tax penalty asserted against petitioner, Tax Law § 685(g) provides:

Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payments thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

B. Tax Law § 685(n), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

The term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

C. The question of whether someone is a “person” under a duty to collect and pay over withholding taxes is a factual one, and has been litigated many times. Factors which should be considered include whether the particular individual had the authority to sign tax returns and did so, derived a substantial part of his income from the business, or had the right to hire and fire employees (*Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 492, 494, *affd* 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person’s official duties, his authority to pay obligations of the business, and his financial interest in the business (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272,273; *see, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799, 801; *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999). Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the business to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990).

D. In addition, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the test is:

[w]hether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

The failure to pay over taxes can be willful notwithstanding the lack of actual knowledge, if the person recklessly disregarded his responsibilities, including the responsibility to see that employment taxes are paid (*Matter of Capoccia v. State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476). Finally, “corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge” (*Matter of Risoli v. Commr.*, 237 AD2d 675, 654 NYS2d 218, quoting *Matter of Ragone v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

E. A review of the record in its entirety results in the determination that petitioner has sustained his burden of proving, pursuant to Tax Law § 689(e), that he was not a person required to collect and remit the withholding taxes on behalf of the PC. This is true despite the fact that there exists evidence to suggest that petitioner was a responsible person, to wit, that he was the president, that he owned 100 percent of the PC’s stock, that he was a signatory on the PC’s bank accounts and had the authority to sign the PC’s tax returns. However, despite the presence of these elements of responsibility, there are a number of other factors which indicate that petitioner was not a person who was under a duty to collect and pay over the PC’s withholding taxes.

Petitioner invested no money in the PC. Although promised that he would be paid \$25,000.00 per year, petitioner was never paid this or any other sum by the PC. He earned substantially all of his income from his private medical practice where he was employed on a full-time basis.

When petitioner purchased the PC in July 1999, the MSA which had previously been entered into between the PC's predecessor, Lynbrook Cardiac Testing, P.C., and the LLC was assumed by the PC and, accordingly, by petitioner. Pursuant to the MSA, the LLC had the general responsibility for management of all but the procurement and supervision of medical personnel. The LLC had been running the business before petitioner's purchase of the PC and continued to do so thereafter. Other than dealing with physicians who performed some services for the PC, petitioner did not hire, fire or manage the PC's employees. He visited the PC's premises approximately twice per year and did not participate in the day-to-day management of the PC's operations.

While petitioner had check-signing authority, he signed no checks on behalf of the PC. During the period at issue in this proceeding, petitioner signed none of the PC's tax returns. It was only upon learning of the PC's tax liabilities that petitioner took control of the PC's financial affairs which included negotiating with taxing authorities, filing returns and taking steps to ensure that the PC's bank accounts could no longer be accessed by David Schick, Mark Gray, Shaya Ostrov and Brian Sandhouse, the persons who previously were signing the PC's checks and were running its day-to-day operations.

In summary, petitioner was sought out by two individuals, Shaya Ostrov and Brian Sandhaus, who were acquaintances of petitioner and who were already involved in the business. Messrs. Ostrov and Sandhaus persuaded petitioner to purchase the stock of the PC and to become its president. Petitioner was not even a passive investor since he was not required to put up any money to purchase the PC's stock. He was told that he would not have to run the business on a day-to-day basis which was an important factor since he was involved in a full-

time medical practice. Petitioner's involvement in the PC was primarily for the anticipated financial windfall when the PC was combined with other similar businesses.

Even if it could be found by virtue of his position as sole stockholder, president and signatory of the PC's bank accounts that petitioner was a person under a duty to collect and pay over the withholding taxes on behalf of the PC pursuant to Tax Law § 685(n), it cannot be determined that the failure to collect and pay over the taxes was willful. This is true because of the provisions of the MSA which provided that the LLC was to have the general responsibilities for the management of the PC and all but its medical personnel and, in addition, because the PC had, previous to petitioner's purchase of the stock, been successfully operating under the management of the LLC and its principals. While it is true that petitioner could have and perhaps should have been more vigilant in supervising the operation of the PC, his failure to do so was not reckless or willful and it subsequently resulted in his having to incur substantial expenses when the PC failed to pay its tax liabilities. Based upon the foregoing, it cannot be found that petitioner *recklessly* disregarded his corporate responsibilities to see that the PC's withholding taxes were paid (*see, Matter of Capoccia v. State Tax Commn., supra; Matter of Ragone v. State Tax Commn., supra*). As noted by the Tax Appeals Tribunal in *Matter of Gallo* (Tax Appeals Tribunal, September 9, 1988):

The essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else. There need not be any particular motive for doing so, only the result that the State has not received the monies held in trust for it. Mere negligence is not enough.

While petitioner may have been somewhat negligent in failing to ensure that the PC's tax liabilities were properly met, petitioner's actions (or inactions) cannot be found to have been willful.

F. The petition of Robert Goodman is granted and the notices of deficiency issued by the Division of Taxation on June 17, 2004 are hereby canceled.

DATED: Troy, New York
May 25, 2006

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE